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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HOWARD ROSS et al.,	
Plaintiffs and Respondents,	G037688
v.	(Super. Ct. No. 04CC08390)
FREDI T. EMLEY et al.,	O P I N I O N
Defendants and Appellants.	

Appeal from an order of the Superior Court of Orange County, Jamoa A. Moberly, Judge. Affirmed.

Neal, Haushalter, Ray & Kurkhill, Ray & Gourde, Burdick M. Ray and Thomas E. Smurro for Defendants and Appellants.

Law Offices of Carlos F. Negrete, Carlos F. Negrete and Nectaria Belantis for Plaintiffs and Respondents.

* * *

Howard and Elizabeth Ross (the Rosses) filed a complaint on August 10, 2004, against their neighbors, Fredi Emley, Edmund Gibbs and Charlotte Gibbs (the Defendants), seeking relief from the obstruction of their view by the Defendants' trees. The parties subsequently settled the lawsuit, but submitted the issue of attorney fees to the trial court. The trial court found the Rosses to be the prevailing parties and awarded them $52,750.50. The Defendants appeal, claiming (1) Civil Code section 1717 prohibits the award of attorney fees where an action has been settled; (2) the evidence compels the determination that the Defendants, not the Rosses, were the prevailing parties; (3) the award is grossly excessive; and (4) the decision was infected by judicial error and misconduct. We affirm.

FACTS

The Rosses and the Defendants live in the Meredith Canyon development in San Juan Capistrano. Meredith Canyon Community Association (the Association) is governed by CC&R's, which prohibit any lot therein from being used to constitute a nuisance or from being improved in such a way as to unreasonably obstruct the view of another homeowner. "No projection of any type shall be placed or permitted to remain above the roof of any residential building with the exception of one or more chimneys and one or more stacks." The CC&R's confer the right to any homeowner to "prosecute a proceeding at law or in equity against the person or persons who have violated or are attempting to violate any of the [CC&R's] to enjoin or prevent them from doing so, to cause said violation to be remedied or to recover damages for said violation." The CC&R's also contain an attorney fees provision.

The Rosses' first amended complaint alleged that the Defendants allowed trees to be planted on their respective lots and maintained so as to create an obstruction of the Rosses' ocean and scenic views, causing their property to lose value. Although the Rosses had asked the Defendants to remove the obstructions, they remained. The Rosses

stated causes of action for nuisance, breach of the CC&R's, and declaratory relief "as to the rights and duties of the respective parties." They requested, inter alia, "an order of the Court permanently barring obstruction of and interferences with the view from PLAINTIFFS' PROPERTY as is required and necessary in order to avoid a multiplicity of suits."

In April 2006, the Defendants' counsel appeared before the trial court and advised that "the merits of the case are settling." He explained that the parties wanted to submit the issue of attorney fees to the court and asked for a briefing schedule on that issue. Subsequently, each side submitted a brief in which it claimed to be the prevailing party and thus entitled to attorney fees.

Both sides attached exhibits to their briefs consisting of correspondence among the parties and the Association. The exhibits reveal that the Rosses had contacted the Association sometime in 1999 regarding a "view issue" and were told that "homeowners must try and resolve view issue[s] between themselves" before seeking help from the Association. The Rosses wrote a letter to the Gibbs in December 2003, introducing themselves and advising that the Gibbs's trees interfered with their view. The Rosses stated, "We are willing to work with you and will offer to pay for the cost of the trimming." Also in December 2003, the Association sent a notice to Emley, asking her to "trim all the trees around your property" because they "block the views of your neighbors." In January 2004, the Association sent a similar notice to the Gibbs, stating that their "[p]ine trees are blocking the view of your neighbors" and asking them to trim "these trees" within 15 days. The Gibbs responded they could not meet that deadline due to "other financial obligations," but they would "trim our trees this spring as our finances allow."

In March 2004, the Association asked the Gibbs's permission to have the trees trimmed "by the Association's professional and experienced landscapers. This action would restore the neighbor's view and the tree trimming would be at no cost to

you." In April, the Association sent notices of hearing to both Emley and the Gibbs, asking them to be present at an Association hearing in May "to discuss trimming of the trees on your lot to allow three of your neighbors the view the[y] once had as required by the CC&R's and requested in previous correspondence."

The Association's counsel wrote to both Emley and the Gibbs on June 28, 2004, reiterating the "Board's Oral Statement of Decision" issued on May 17, that "the affected trees must be reduced in height to at or below the chimney height of your residence." The letter confirmed that both Emley and the Gibbs had declined the Association's offer to pay for the tree trimming, but stated that the Association would "honor its commitment to replace any tree which dies as a result of the trimming/topping." Acknowledging that the health of the trees might require trimming during the fall or winter months, the letter stated, "[T]he Board of Directors will allow you to complete the requested work on or before February 1, 2005."

The complaint was filed in August 2004. The Defendants' demurrer was sustained, and the complaint was amended in February 2005. The exhibits reveal correspondence between the attorneys for the parties during the summer of 2005. A trial date in October 2005 was continued to April 24, 2006. In January 2006, the Gibbs had certain trees trimmed and then removed some of them; Emley had some of her trees trimmed. The results were not satisfactory to the Rosses, and by this time the hostilities between the attorneys and their clients were evident. Each side blamed the other for the delays in resolving the case.

In April 2006, the parties reached a settlement of all issues except attorney fees. A settlement agreement was drafted whereby the Defendants agreed to "maintain, trim, lace, top and/or cut their trees and/or vegetation on DEFENDANTS' own properties . . . in such a manner so as to provide the PLAINTIFFS WITH AN UNOBSTRUCTIVE BLUE WATER VIEW OF THE PACIFIC OCEAN, CATALINA ISLAND, CITY AND SURROUNDING LANDSCAPES FROM the ROSS' property"

subject to the limitation that the "main trunks and branches" of trees would only be cut during the winter months. Defendants agreed to perform the tree trimming within 30 days of written notification by the Rosses of the need to do so and receipt of "a reasonably specific identification of the individual trees/vegetation . . . and the number of feet or yards to be cut/trimmed/laced/crowned/topped . . . ." The Rosses were given a continuing right to go onto the Defendants' properties to measure the trees, and the Defendants agreed to perform the trimming at their own expense. The agreement specifically exempted the issue of attorney fees from the settlement, providing that "[t]he attorneys' fees/costs issue shall be decided by the court system."

Counsel for the parties appeared on June 26, 2006, each arguing his clients were the prevailing parties for purposes of attorney fees. The court took the matter under submission. On July 14, 2006, it issued a minute order finding that the Rosses were the prevailing parties and they were "entitled to an award of reasonable attorney's fees and costs incurred in this action after February 1, 2005." On September 12, 2006, the court awarded the Rosses reasonable attorney fees of $52,750.50. It denied fees totaling $3620.10, which were based on duplicate entries, excessive fees or insufficient information. It also denied additional fees of $5000 sought by the Rosses because they "were not adequately broken down [or] supported." The voluntary dismissal filed by the Rosses was entered on September 19, 2006.

DISCUSSION

The Basis for an Attorney Fee Award

The Defendants first contend the trial court was prohibited from making a prevailing party determination because the action had been dismissed pursuant to a settlement. They cite Civil Code section 1717, subdivision (b)(2), which states: "Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section. . . ."[1]

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1 All statutory references are to the Civil Code.

The Defendants are wrong for two reasons. First, the parties stipulated to submit the attorney fee question to the trial court after settling the merits of the action. Under similar circumstances, the court in *Jackson v. Homeowners Assn. Monte Vista Estates-East* (2001) 93 Cal.App.4th 773 held that such a stipulation operated as a waiver of section 1717, subdivision (b)(2). After settlement and before dismissal, one party moved for attorney fees and the other invoked section 1717, subdivision (b). The court allowed the motion to be heard. "The parties expressly agreed, on the record and in the written settlement agreement, to have the trial court determine whether there was a prevailing party and, if so, determine which party prevailed, and then to award attorney fees accordingly. The trial court did so, and we find that the homeowners association thereby waived its current contention that this procedure was precluded by section 1717, subdivision (b)(2)." (*Id.* at p. 784.)

The Defendants point out the settlement agreement provides for a dismissal to be filed "forthwith" after its execution. They assert that the agreement was signed by all parties as of June 5, 2006, thus requiring an immediate dismissal and "triggering" the prohibition against a prevailing party under section 1717, subdivision (b)((2). But the parties' subsequent actions belie this argument. At some point after the settlement agreement had been drafted, the Defendants' counsel became aware of subdivision (b)(2) of section 1717 and brought it to the attention of the Rosses' counsel. At that point, the agreement had been signed by some of the parties, but not all, and no dismissal had been filed. The two counsel brought their dilemma before the trial court, who explained they could not dismiss the action until after the hearing on attorney fees if they wanted to reserve that issue to be tried by the court. "It's an issue of jurisdiction because once it's dismissed, the court no longer has jurisdiction." Counsel then clearly stipulated that the remaining parties could "sign the agreement, send the pages, and then we agree on the record today that we will not have the dismissal filed until after the ruling on the attorneys' fees."

It is clear that the parties intended to postpone filing the dismissal specifically so the attorney fees could be adjudicated by the court. We find they waived the application of section 1717, subdivision (b)(2).

Second, the Rosses' complaint sought attorney fees not only under the contractual provisions of the CC&R's but under section 1354, part of the Davis-Stirling Common Interest Development Act. That section provides that "[t]he covenants and restrictions in the declaration [CC&R's] shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both." (§ 1354, subd. (a).) Subdivision (c) of that section provides that the prevailing party in an action to enforce the CC&R's "shall be" awarded attorney fees.

Thus, section 1354, subdivision (c) provides an independent basis for the determination of the prevailing party. And when attorney fees are sought under a fee-shifting statute, such as section 1354, the trial court has jurisdiction to determine the prevailing party even after a voluntary dismissal. (*Kim v. Euromotors West/The Auto Gallery* (2007) 149 Cal.App.4th 170, 178; *Parrott v. Mooring Townhomes Assn., Inc.* (2003) 112 Cal.App.4th 873, 877.)

The Prevailing Party Determination

The Defendants claim there is no evidence to support the determination that the Rosses were the prevailing party, arguing "they got none of the things they sought in this case." The Defendants argue the Rosses got less in the settlement agreement than what they were seeking in their complaint, what they demanded during the litigation, and what they received from the Association's decision in June 2004.

"Prevailing party" is defined in section 1717 as "the party who recovered a greater relief in the action on the contract." (§ 1717, subd. (b)(1).) Section 1354, subdivision (c), does not define "prevailing party," but case law has adopted a pragmatic

approach in which the trial court must "analyze[] which party ha[s] prevailed on a practical level." (*Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568, 1574; see also *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 150.) Where an action has been settled before trial and no statutory definition of "prevailing party" applies, "a court may base its attorney fees decision on a pragmatic definition of the extent to which each party has realized its litigation objectives . . . . [Citation.]" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 621-622.) The trial court is uniquely suited to determine which, if any, party has prevailed for purposes of an attorney fee award, and its determination will not be disturbed by us absent an abuse of discretion. (*Jackson v. Homeowners Assn. Monte Vista Estates-East, supra*, 93 Cal.App.4th at p. 789.)

The Defendants argue that the Rosses' action was unnecessary and premature because the Association ruled the Defendants had to cut their trees by February 1, 2005. They argue it is unfair to saddle them with attorney fees when they did not have a chance to comply with the Association's demand before litigation commenced. They contend they received the greater relief in the settlement because they achieved a seasonal limitation on their duty to trim their trees and they never had to trim them all the way to chimney height, thus defeating at least two demands in the Rosses' complaint.

The Rosses contend they were clearly the prevailing party because they achieved their main litigation objective, which was the removal of obstructions to their view maintained by the Defendants notwithstanding demands by the Rosses and the Association to remove them. They point out the Defendants did not comply with the Association's demand to trim their trees by February 1, 2005, instead waiting until the eve of trial to even attempt compliance.

The trial court's determination that, on balance, the Rosses prevailed was well within the trial court's discretion. The refusal to charge the Defendants with the

Rosses' attorney fees until after the Association's deadline indicates the trial court's recognition that the Defendants' compliance with that deadline would have been reasonable. But the Defendants did not comply, and the court could have concluded compliance would never have come absent the litigation. Furthermore, the settlement agreement set out a mechanism for the ongoing resolution of view issues, which was a significant benefit to the Rosses.

The Amount of the Attorney Fee Award

The Defendants argue the amount of the attorney fee award is excessive. They contend the billings contain duplicate or triplicate entries, and inflated, unsupported, and impermissible charges.

"'The "experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong" – meaning that it abused its discretion. [Citations.]'" (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) The court must determine a reasonable number of hours spent, multiplied by a reasonable hourly rate. "Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary." (*Ibid.*)

The Rosses submitted detailed billings showing in excess of 400 hours at $300 per hour. The trial court reviewed each entry and disallowed approximately ten percent of them as inappropriate; it also disallowed a requested lump sum for additional time that was not adequately supported. The resulting award was within the trial court's discretion.

The Rosses' Motion for Sanctions for a Frivolous Appeal

The Rosses seek their attorney fees and costs incurred in responding to this appeal, claiming it is "utterly frivolous and filed in bad faith to delay." (See Cal. Rules of Court, rule 8.276(e).) The Defendants' oversized opening brief contains several

extraneous and frivolous arguments, such as accusing the trial court of judicial misconduct for (1) failing to rule on written objections without their request to do so (see *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780); (2) asking questions of counsel which he interpreted as the trial court's failure to have read the briefs before taking the prevailing party issue under submission; and (3) asking counsel if the case had been reported in the media. But the main points of the appeal, while unmeritorious, cannot be characterized as frivolous. "An appeal is not frivolous just because it has no merit." (*Applied Business Software Inc. v. Pacific Mortgage Exchange, Inc.* (2008) 164 Cal.App.4th 1108, 1119.)

DISPOSITION

The order awarding attorney fees is affirmed. Respondents are entitled to costs on appeal.

SILLS, P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.